



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

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OCCL

Mr. Nick Schwellenbach
Project on Government Oversight
1100 G St NW
Suite 500
Washington, DC 20005

Dear Mr. Schwellenbach:

This is the final response to your Freedom of Information Act (FOIA) request dated March 6, 2012, for "*a copy of the 'Independent Review of MRI Outcomes'.*" We received your request on March 6, 2012, and assigned it FOIA case number 12-00114-F. I have determined that the enclosed pages can be released without excision. This action closes your request in this office.

Sincerely,


Jeanne Miller
Chief, Freedom of Information and
Privacy Office

Enclosure(s):
As stated

Inspector General

United States
Department of Defense



Assessment Report May 16, 2011

Review of Office of Deputy Inspector General
for Administrative Investigations, Directorate
for Military Reprisal Investigations

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Executive Summary

On November 1, 2010, the Principal Deputy Inspector General, Department of Defense (DoD), Office of Inspector General (IG) appointed three internal employees to examine the resolution of military reprisal complaints by the Directorate for Military Reprisal Investigations (MRI).¹ The Review Team was provided 169 military reprisal cases selected through random sampling by the Quantitative Methods Directorate (QMD), a subsection of the Audit Component for DoD IG. The sampling population was comprised of cases closed in fiscal year 2010. The Review Team (the Team) was chartered to conduct a qualitative review of each file and either agree or disagree with MRI's decision, solely based on the information contained in the case file. Of the 169 cases selected, the Team agreed with 82 case decisions, disagreed with 74 case decisions, and for the reasons discussed below, did not review 13 cases.

MRI's process classifies their case files in three categories: Declinations, Preliminary Inquiries, and Full Investigations. Based on these categories, the 169 cases were divided as such: 52 Declinations, 98 Preliminary Inquiries, and 19 Full Investigations.

Within these categories, the Team made the following assessment: Of the 52 Declinations, the Team did not assess two cases because they were currently open; of the 50 cases reviewed, the Team disagreed with MRI's decision in 34 cases, or 68%, and agreed with 16 decisions, or 32%. The reasons for disagreeing with MRI's decision can be grouped into four categories: (1) the Team considered letters of reprimand/counseling/instruction to be Unfavorable Personnel Actions (UPA), while MRI did not, unless the letters were placed in the complainant's permanent personnel file; (2) the Team considered threats of UPAs as UPAs while MRI did not. In these cases, when MRI informed the complainants of their decision, they also noted the complainant could re-file if the threat of the UPA was actually carried out; (3) the Team did not think cases should be dismissed at the Declination stage simply because the complainant did not or could not provide documentation to verify all allegations; and (4) the Team disagreed with MRI for other or miscellaneous issues.

Of the 98 Preliminary Inquiries, the Team did not opine on ten cases because eight appeared to be active and under investigation; one involved a contractor, instead of a military member; and in one case, the complainant, through their attorney, filed a rebuttal that was currently under review. Of the 88 cases reviewed, the Team disagreed with MRI's decision in 40 cases, or 45.5%, and agreed with 48 decisions, or 54.5%. The Team's disagreement can be grouped into four categories: (1) the Team considered letters of reprimand, counseling, and Instruction to be a UPA, while MRI did not, unless the letters were placed in the complainant's permanent personnel file; (2) cases were closed without interviewing the Responsible Management Officials (RMO), although the RMO's intent was often assumed. The Team did not think that this approach was proper, and therefore, believes that the RMOs should have been interviewed; (3) the file did not contain sufficient information/documentation to render a decision. There either was a lack of documents or relevant issues were not explored or resolved; and (4) the Team disagreed with MRI for other or miscellaneous issues.

¹ See Appendix A.

Of the 19 Full Investigations, the Team did not render an opinion in one case because it appeared to be a Preliminary Inquiry. Of the 18 cases the Team assessed, it agreed with ten cases, 55.5%, and disagreed with eight cases, 44.5%. The Team's reasoning for disagreement with eight Full Investigations fell into one of three categories: (1) the file was not fully developed, e.g. necessary interviews not conducted or discrepancies not resolved; (2) actions the Team felt were UPAs were not considered UPAs by MRI; and (3) the Team disagreed with MRI for other or miscellaneous issues.

It should be noted that the Team is not stating that 74 cases would have been substantiated had they gone to full investigation. To the contrary, the Team thinks that many of the cases would not have been substantiated; however, the Team could not affirm the decision because the information in the file did not support it.

Introduction

The DoD prohibits reprisal against service members for making or preparing to make a protected communication. Moreover, it is the policy of DoD that members of the Armed Forces shall be free from reprisal for making or preparing to make protected communications, and that no person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing to make a protected communication.

The DoD IG, MRI, is responsible for investigating, overseeing, and adjudicating complaints of reprisal from military members. The process MRI follows to investigate and adjudicate complaints of reprisal from military members is governed by 10 U.S.C. § 1034 (LexisNexis 2011) and DoD Directive 7050.06, Guide To Investigating Reprisal And Improper Referrals for Mental Health Evaluation, February 6, 1996, which implements the Statute. The DoD IG has also issued Inspector General Guide (IGDG) 7050.6 to further assist investigating and adjudicating complaints of reprisal from military members.

Standards

10 U.S.C. § 1034, states in section (a)(1) that “[n]o person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.” Furthermore, section (b)(1) states that “[n]o person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing . . .” a protected communication. 10 U.S.C. § 1034 defines a protected communication in section (b)(1)(A) as “a communication to a Member of Congress or an Inspector General that . . . may not be restricted; or” in section (c)(2) “. . . a communication in which a member of the armed forces complains of, discloses information that the member reasonable believes constitutes evidence of, any of the following: (A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination. (B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”

DoD Directive 7050.06, states: a personnel action is any action taken on a member of the Armed Forces that *affects*, or *has the potential* (emphasis added) to affect, that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluations under DoD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's grade. During the review, the Team did not find a definition in the Statute, DoD Directive 7050.6, or the IGDG 7050.06 for the term unfavorable. Therefore, to ensure consistency in the review, the Team utilized the following definition from Webster's II New Riverside University Dictionary (1984): Unfavorable: Negative, adverse, undesirable, and disadvantageous.

10 U.S.C. § 1034, states in section (c)(3)(a) that “An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine, in accordance with regulations prescribed under section (h), whether there is sufficient evidence to warrant an

investigation.” In conducting the review, the Team could not locate a definition of “sufficient evidence” in the Statute, DoD Directive 7050.06, or the IGDG 7050.6 Reference Guide for conducting Military Reprisal Investigations. Therefore, to ensure consistency while reviewing the cases, the Team developed their own. In developing this working definition, the Team consulted Black’s Law Dictionary, Fifth Edition, 1979, that contained the following definition:

“sufficient evidence” adequate evidence; such evidence, in character, weight, or amount as will legally justify the judicial or official action demanded; according to circumstances, it may be “prima facie” or “satisfactory for the purpose; that amount of proof which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt.” The term is not “conclusive” but may be used interchangeably with the “weight of evidence.”

The final working definition agreed to and used by the Team was: sufficient evidence the facts justify a full investigation of a Military Whistleblower Complaint of Reprisal. Proof must include a protected communication, followed by an unfavorable personnel action, or withholding a favorable action, or a threat of either, and the facts indicate that the responsible official had knowledge of the protected communication (or suspected/believed one was made) before an action was taken or withheld. In addition, the Team determined that in order to assess whether a case file contained sufficient evidence, the Investigator must have obtained testimony or a statement from the responsible management official.

10 U.S.C. § 1034, states in section (e)(4) that “the report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.” DoD Directive 7050.06, 5.1.6. states:

Issue a report of investigation within 180 days of the receipt of an allegation of reprisal and/or restriction investigated by the IG DoD. The report of investigation shall include a thorough review of the facts and circumstances relevant to the allegation(s), relevant documents acquired during the investigation, and summaries or transcripts of interviews conducted. The report may include a recommendation(s) as to the disposition of the complaint. If a determination is made that the report cannot be issued within 180 days, notify the Deputy Under Secretary of Defense for Program Integration (DUSD(P)), under the Under Secretary of Defense for Personnel and Readiness, and the member or former member of the reasons for the delay and when that report will be issued.

The IGDG 7050.6, 2-13, states, in pertinent part, that conclusions be based on the administrative evidentiary standard of a preponderance of the evidence. The Team notes that the Statute, DoD Directive 7050.06, and IGDG 7050.6 do not define “preponderance of the evidence.” Therefore, the Team utilized the following definition from Black’s Law Dictionary, Fifth Edition, 1979 to ensure consistency of our review: “Preponderance of the Evidence - Evidence which is of greater weight or more convincing than the evidence which is offered in

opposition to it; that evidence which as a whole shows that the fact sought to be proved is more probable than not.” The Team noted, however, that while the above authorities and guidance do not define the aforementioned standard, IGDG 7050.6, 2-13 does state the following with respect to a preponderance of the evidence: “In other words, give greater weight to the evidence which you find most credible, most convincing, and that which demonstrates to the reader that it is more probable than not that the facts and circumstances occurred as set forth in the report. Do not use the criminal evidentiary standard of ‘beyond a reasonable doubt.’”

MRI’s Process

Based on the review of the files, the Team determined that Service members may file a reprisal complaint directly to the DoD IG Hotline, or with a Service IG. If a complaint is filed with a Service IG, the Service IG must notify MRI within ten working days of receipt of the complaint, and MRI will review and concur/non-concur on the Service IG’s disposition of the complaint. In the event that a complaint is filed directly with the DoD IG Hotline, Hotline will receive the complaint and then will forward it to MRI. MRI then conducts an initial assessment to determine whether the complaint warrants an investigation. In conducting their review of complaints, MRI employs an “acid test” that is articulated in IGDG 7050.6, 2-1. This guide states that an investigator must gather enough evidence to answer four questions in order to complete a thorough military reprisal investigation. The questions are:

- 1 Did the military member make or prepare a communication protected by statute?
2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?
3. Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the protected communication?
4. Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

The Director of MRI conducts this initial review which may result in an immediate declination and closure, or a request back to the complainant for more information.² If there is a determination more information is needed, the communication with the complainant is made through the Hotline and not by MRI. If the requested information is received, Hotline will forward the supplemental information to MRI and the initial review will be continued; this can result in a declination of the complaint or progression to Preliminary Inquiry. If the complaint is declined, the complainant will be notified by Hotline; if the case progresses to a Preliminary Inquiry, it will either be assigned to an MRI investigative team or a Service IG.

During the Preliminary Inquiry stage, a case investigator will interview the complainant and other witnesses as appropriate, obtain additional documentation from the complainant and command sources, and then make a determination as to whether the case should proceed to the

² In mid-2010, MRI changed their procedures, and the initial review is no longer solely conducted by the Director, but by two of the Team Chiefs.

Full Investigation stage. During a Full Investigation, a determination is made as to whether the facts support, by a preponderance of the evidence, that reprisal did or did not occur.

Under the Statute, DoD Directive 7050.06, and IGDG 7050.6 this four step process is not required. Instead, the Statute, DoD Directive 7050.06, and IGDG 7050.6 only require that a case contain sufficient evidence of reprisal to warrant a full investigation.

Objectives

The Team was organized to only assess the conclusions reached by the MRI Directorate on 169 military whistleblower reprisal complaints that were closed during fiscal year 2010 and identify any investigator bias. While the charter indicates that the Team will assess whether the conclusions are supported by sufficient evidence, no such standard existed for application to the four stages of the investigative process followed by MRI; as such, the Team devised its own definitions as described in the Standards section of this report. A detailed discussion of the Team's methodology will be included in the following section.

Scope and Methodology

The Team evaluated military whistleblower reprisal complaints that were closed in fiscal year (FY) 2010. MRI closed 534 cases in FY2010.³ These cases were in three categories: (1) 110 Declination cases, (2) 305 Preliminary Inquiry cases, and (3) 119 Full Investigation cases. Based on the overall universe of 534 cases, QMD devised a sampling plan for each of the three categories.⁴ Based on the results of the sampling, the Team assessed: 52 Declinations, 98 Preliminary Inquiries, and 19 Full Investigations. Each case was reviewed independently by each Team member, and then consensus was reached amongst the Team as to whether the Team agreed or disagreed with MRI's disposition of each case. During the consensus meetings, the Team normally required little or no discussion to reach consensus. In fact, for an overwhelming majority of the cases, the Team reached the same conclusion independently. The Team based its decisions solely on the files that were provided by MRI. The Team did not interview MRI staff or staff from the Service IG offices.⁵ Prior to launching the review, the Team received training on the MRI process from MRI.⁶

Discussed below is the methodology utilized for each of the three categories of cases. Declinations - The Team applied the statute, the DoD Instruction, and the MRI guidebook to make independent decisions as to whether the complaint should have proceeded to the Preliminary Investigation stage. The Team did not evaluate or comment on whether the Team thought the complaint had merit to be substantiated, only if it met the initial "acid test" and should have proceeded to the next stage in the process. Preliminary Inquiries - At this stage, the Team agreed or disagreed with MRI's decision whether the case contained "sufficient evidence"

³ This number, and the population used for the sampling process, was provided by QMD; however, during the "kick-off meeting" MRI slide #4 cited 679 complaints were closed. See Appendix B.

⁴ QMD's methodology is explained in Appendix C.

⁵ One MRI staff member approached the Team unsolicited, requested to speak with the team and was accommodated. However, the discussion occurred after all cases had been reviewed and the analysis had been completed.

⁶ The training slides are attached at appendix D.

to proceed to full investigation or not.⁷ Full Investigations - The Team analyzed all the evidence contained in the file and agreed or disagreed with MRI's conclusion as to whether or not allegations of reprisal were substantiated. In determining whether or not reprisal occurred, the Team utilized the legal standard of a preponderance of the evidence.⁸

Observations

The Team organized its observations in accordance with MRI's three categories of cases: Declination stage, Preliminary Inquiry stage, and Full Investigation stage. Below are the observations by stage.

Declination Stage

For this category, the Team was provided 52 sample cases that were closed in Fiscal Year (FY) 2010. The Team notes that two cases in the sample appeared to be active, and therefore, the Team did not assess these cases. Of the 50 cases reviewed,⁹ the Team disagreed with MRI's decision in 34 cases, and agreed with 16 decisions. Of the cases the Team disagreed with, the Team categorized its observations into three main areas discussed below, and an "other" category. There were 12 cases in the other category and MRI declined the cases for various reasons with which the Team disagreed. The Team also noted that some cases were declined for multiple reasons; so they fell into more than one of the following categories.

1. Letters of reprimand, counseling, and instruction that were issued after a protected communication was made, and held locally, were not considered unfavorable personnel actions under 10 U.S.C. §1034.

MRI declined to further investigate cases of military whistleblower reprisal because letters of reprimand, counseling, or instruction that were locally held were not considered unfavorable personnel actions. The Team disagreed with this analysis. DoD Directive 7050.06 states: a personnel action is any action taken on a member of the Armed Forces that *affects, or has the potential* (emphasis added) to affect, that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluations under DoD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's grade. Of the cases the Team reviewed, several contained Letters of Counseling (LOC) that stated additional action may be taken against the member including separation, if the subject behavior continues. Moreover, Air Force Instruction, 36-2907, 3.1.1 and 3.1.2., June 17, 2005, states that raters must take into account locally held LOCs. The Team did not locate similar instructions for the remaining Services; however, the Team determined that the letters should be reviewed not summarily dismissed.

⁷ The Team used the definition of "sufficient evidence" as described in the Standards section of this report.

⁸ The Team used the definition of "preponderance of the evidence" as described in the Standards section of this report.

⁹ The details of each case decision in this stage can be found in Appendix E.

Based on the plain language of the DoD Directive 7050.06, letters of counseling, reprimand and instruction are personnel actions that have the potential to affect the member's current position or career. Moreover, despite being locally held, letters of counseling, reprimand, or instruction could be used in a later action, as discussed above, and have the potential to affect the service member's current position or career. Consequently, the Team disagreed with MRI's decisions. The Team disagreed with MRI's decision in 34 cases in the declination stage; for 10 of the 34 cases, the Team disagreed because letters of reprimand, counseling, or instruction that were locally held were not considered unfavorable personnel actions.

2. Cases were declined because a member only received a threat of an unfavorable personnel action, or could challenge an underlying action in another forum.

MRI declined to further investigate cases where a member received a threat of an unfavorable personnel action and/or because an action could be challenged in another forum. 10 U.S.C. § 1034 states that "[n]o person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action. . . ." In some of the cases the Team reviewed, members were threatened with negative fitness reports, termination, and court martial proceedings. Rather than allow the complaint to proceed to the next stage in the process, MRI instructed the member that if the action occurs, they could file their complaint again, and thus declined the complaint.

The Team considered these threats to be threats of unfavorable personnel actions. Therefore, these cases should not have been declined because the member only received a threat of an unfavorable personnel action; this is contrary to 10 U.S.C. § 1034.

MRI also declined a case because the member could challenge the action in another forum; these examples included suspension of medical credentialing, surgical privileges, and professional privileges. Based on our review there is no statutory authority, DoD Directive, or IG Instruction to decline a complaint of reprisal from a military member because the member could challenge the underlying action in another forum. In addition, there is also no statutory authority to decline a complaint because a member has challenged the underlying action in another forum. Therefore, the Team disagreed with MRI's decision in this case. The Team disagreed with MRI's decision in 34 cases in the declination stage; for eight of the 34 cases, the Team disagreed because threats of UPA's were not considered and because a member could challenge the action in another forum.

3. Cases were declined for lack of documentation or details submitted by the member supporting the allegation of a protected communication and unfavorable personnel action.

MRI declined to further investigate cases because complainants did not provide hardcopy documentation of the alleged protected communication(s), unfavorable personnel action(s), or documentation that the responsible official was aware of the protected communication prior to implementing an unfavorable personnel action. DoD Directive 7050.06, Enclosure 3, E3.1.3.2 states: that a complaint should include "[a] copy of the protected communication and any reply about the matter. If a copy is not available, include the date of the protected communication; to whom the protected communication was made; the content of the protected communication; and

whether the matter was investigated, when, and by whom.” Furthermore, as for personnel actions, “[i]dentify the personnel action(s) . . . taken, withheld, or threatened to be taken or withheld. Provide documentation for the personnel action. If unavailable, describe the personnel action and the date of the action.” *Id.* at E3.1.3.3.

IGDG 7050.6, 2-4 states that if the documentation is insufficient, contact the appropriate official to whom the protected communication was made and obtain any testimony or documents necessary to show whether a protected communication was made. This guidance also states that if unable to establish with any certainty that the complainant made or prepared a protected communication, give the whistleblower the benefit of the doubt and proceed with the investigation. *Id.*

As mentioned above, the complaints in this category were received through the DoD IG Hotline. This means that complainants filed their complaints by contacting the Hotline number, or utilizing the automated system. With either avenue, the complainant provides information about the allegation(s) of reprisal, and a form is forwarded to MRI for processing. The option of using an automated complaint system and discussing the matter over the phone is inconsistent with a requirement to provide documentary evidence at this stage. In these cases we disagree with MRI that the complainant did not provide sufficient specificity for the complaint to proceed to the next stage. In at least one case, the complainant was deployed in a combat zone; requiring this individual to provide documentation appears to be contrary to the intent of the statute and DoD policy.

Based on the DoD Directive and DoD IG guidance, it is reasonable to expect that not all complaints submitted will contain all the documentation to prove allegations of reprisal. Rather, the investigator should obtain this documentation during the investigation. Furthermore, placing the burden of supplying documentation of the protected communication or unfavorable personnel action at the filing stage could be onerous for a complainant, especially while in a deployed environment. For these reasons, the Team disagrees with the practice to close complaints based on the complainant’s failure to provide all requested documentation during this initial phase. The Team disagreed with MRI’s decision in 34 cases in the declination stage; for 15 of the 34 cases, the Team disagreed because MRI required complainants to provide documentation of the alleged protected communication(s), unfavorable personnel action(s), or documentation that the responsible official was aware of the protected communication prior to implementing an unfavorable personnel action.

Preliminary Inquiry Stage

For this stage of the review, the Team assessed MRI’s decision on whether the cases contained “sufficient evidence” to warrant a full investigation.¹⁰ During this stage, the Team was provided 98 randomly selected cases from FY 10 that were closed at the Preliminary Inquiry stage. Of the 98 cases, 74 were processed by Service IGs and forwarded for MRI’s concurrence and 24 were processed by MRI. The Team noted that although included in the Preliminary Inquiry sample, some of the 74 cases investigated by the Service IGs appeared to be Declinations. The Team accounts for this by the fact that the three stage process appears to be

¹⁰ The Team used the definition of “sufficient evidence” as described in the Standards Section of this report.

unique to MRI. Also, of the 98 cases, eight appeared to be active and at the Full Investigation stage, one involved a contractor (instead of a military member), and one was being rebutted. Therefore, the Team did not assess MRI's disposition of these ten cases.

Of the 88 cases the Team decided, the Team disagreed with MRI's decision in 40 cases and agreed with 48 decisions.¹¹ While the numbers below will capture statistics for the entire sample, it is of note that of the 24 cases for which MRI had sole responsibility, eight of them were included in the aforementioned category of being open or active, involving a contractor, or being rebutted. For the 16 cases the Team did evaluate, the Team disagreed with MRI's decision in ten of them and agreed with six. Of the cases the Team disagreed with, the Team categorized its observations into three main areas discussed below and an "other" category. In the other category, cases were declined for various reasons for which the Team disagreed and there were eight cases in this category. The Team also notes that some cases fell into more than one category for disagreement.

1. Letters of reprimand, counseling, and instruction that were issued after a protected communication was made, and held locally, were not considered unfavorable personnel actions under 10 U.S.C. § 1034.

MRI declined to further investigate cases of military whistleblower reprisal because letters of reprimand, counseling, or instruction that were locally held were not considered unfavorable personnel actions. The Team disagreed with this analysis. DoD Directive 7050.06, states: a personnel action is any action taken on a member of the Armed Forces that *affects, or has the potential* (emphasis added) to affect, that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluations under DoD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's grade. Of the cases the Team reviewed, several contained LOCs that stated additional action may be taken against the member including separation, if the subject behavior continues. Moreover, Air Force Instruction, 36-2907, 3.1.1 and 3.1.2., June 17, 2005 states that raters must take into account locally held LOCs. As previously stated, the Team did not locate similar instructions for the remaining Services; however, the Team determined the letters should be reviewed not summarily dismissed.

Therefore, based on the plain language of the DoD Directive 7050.06, letters of counseling, reprimand, and instruction are personnel actions that have the potential to affect the member's current position or career. Moreover, despite being locally held, letters of counseling, reprimand, or instruction could be used in a later action, as discussed above, and have the potential to affect the service member's current position or career. Consequently, the Team disagreed with MRI's decisions. The Team disagreed with MRI's decision in 40 cases in the Preliminary Inquiry stage; for eight of the 88 cases, the Team disagreed because letters of reprimand, counseling, or instruction that were locally held were not considered unfavorable personnel actions.

¹¹ The details of each case decision in this stage can be found in Appendix F.

2 Cases were closed without obtaining a statement or any facts directly from the responsible management official.

MRI declined to refer cases for full investigation without obtaining a statement from the RMO. This is contrary to IGDG 7050.6. IGDG 7050.6, 2.5 Knowledge by RMO (“Acid Test” Question 3) “Ask each responsible management official:

1. When and how did you first become aware that the complainant made or prepared a protected communication?; and
2. When and how did you first suspect or come to believe that the complainant made or prepared a protected communication?”

The IGDG 7050.06 requires that the RMO be interviewed, or at a minimum, documentation in the file must enable an assessment of RMO knowledge of the protected communication and the motivation for the action s/he took, withheld, or threatened. The guide further states:

If anyone of the responsible management officials knew or suspected that the complainant made or prepared the protected communication before the action was taken, withheld or threatened, then the investigation must continue. If there is no evidence that any responsible management official who recommended, took, or approved the personnel action knew or suspected that the complainant made or prepared a protected communication before deciding to take or taking the action, then the investigator may terminate the investigation. If the evidence is insufficient to determine who knew what and when, give the benefit of the doubt to the complainant and proceed with the investigation. *Id.*

In several cases, the investigators’ summaries had to assume why management took the alleged action, because interviews or statements were not obtained.

In applying the standard for sufficient evidence, the Team concludes that it cannot be determined whether there is sufficient evidence to warrant a full investigation without obtaining a statement from the responsible management official(s). Therefore, the Team disagreed with MRI’s decisions in these cases. The Team disagreed with MRI’s decision in 40 cases in the Preliminary Inquiry stage; for 27 of the 88 cases, the Team disagreed because the files did not contain a statement from the RMO.

3. The file did not contain sufficient information/documentation in order for the Team to render a decision. There either was a lack of documents or relevant issues were not explored or resolved.

MRI found in these cases that there was not sufficient evidence to warrant a full investigation. In the review of these cases, the Team opined that the content of the file was insufficient in order to draw such conclusions.

In several cases there were no documents detailing the complaint or investigation - only a document indicating an investigation had been conducted by DoD IG, Investigations of Senior Officials (ISO) Directorate. In another case, there were documents from the original complaint in 2005, but no other documents indicating the matter had been investigated. Some of the files provided details of the investigation; however, central issues or conflicts raised during the investigation were not addressed or resolved. One example is a case in which a Temporary Duty (TDY) assignment was deemed not to be a UPA although no apparent evaluation of the TDY was conducted to determine whether it would affect the member's career. In another example, an Officer Evaluation Report (OER) was deemed not to be a UPA when the file clearly stated the member was denied a NATO job based solely on the OER. Since the information in the file did not support MRI's decision, the Team disagreed with the MRI decisions. The Team disagreed with MRI's decision in 40 cases in the Preliminary Inquiry stage; for eight of the 88 cases, the Team disagreed because the file did not contain sufficient information/documentation in order for the Team to render a decision.

Full Investigation Stage

For the final stage in the process of investigating military reprisal complaints, the Team determined whether they agreed or disagreed with MRI's decision as to whether, by a preponderance of the evidence, reprisal was the reason for the action taken, withheld, or threatened by the RMO.¹² For this stage, the Team received 19 sample cases from FY 2010 that were fully investigated. Of those 19 cases, the Team did not review one case because it appeared to be a case more properly in the Preliminary Inquiry stage, and not the Full Investigation stage.

Of the 18 cases actually reviewed, the Team disagreed with MRI's decision in eight cases, and agreed with ten decisions.¹³ Of the cases the Team disagreed with, the Team categorized its observations into two main areas discussed below, and an "other" category. In the other category, there was one case the Team disagreed with, and it involved an allegation of restriction under 10 U.S.C. § 1034.

The file did not contain sufficient information/documentation in order for the Team to render a decision.

At the conclusion of an investigation, the investigator must analyze the evidence collected during the investigation and determine, by the administrative evidentiary standard of a preponderance of the evidence, whether reprisal was the reason for the action taken, withheld, or threatened. As discussed earlier in this report, IGDG 7070.6, 2-13 provides guidance to interpret the standard of preponderance of the evidence, but it does not provide for a clear definition. Therefore, the Team utilized the definition stated in the Introduction section of this report in reviewing MRI's conclusions.

In reviewing the cases under this observation, the Team disagreed with MRI's decision that reprisal was not substantiated because the investigative report was not thoroughly developed to

¹² The Team used the definition of "preponderance of the evidence" as described in the Standards Section of this report.

¹³ The details of each case decision in this stage can be found in Appendix G.

allow one to determine, by a preponderance of the evidence, whether reprisal occurred. For example, in one case, a RMO claimed they issued the UPA based on an opinion by a Judge Advocate General Officer; however, this officer was never interviewed. The Team found this gap created unanswered questions and resulted in the file not supporting the decision. In another case, three RMOs were not interviewed. All three of these RMOs were involved in either the evaluation or the letter of reprimand writing process. Not interviewing these RMO's left many unanswered questions. The Team determined that without these crucial interviews, there was not enough information to affirm MRI's decision of unsubstantiated reprisal.

In two other cases, conflicts in the RMO's testimony were never resolved, and additional relevant interviews or follow-up interviews were never conducted. Consequently, the decision by MRI could not be supported. As a result of this missing crucial information, the Team could not determine, by a preponderance of the evidence, whether or not reprisal occurred, and thus disagreed with MRI's decisions in these cases. The Team disagreed with MRI's decision in eight cases in the Full Investigation stage; for five of the 18 cases, the Team disagreed because the file did not contain sufficient information/documentation in order to render a decision.

2. Actions taken by the responsible management official were not considered unfavorable personnel actions by MRI.

For these cases the Team disagreed with MRI's decision because actions taken by RMOs were not considered UPAs. The Team determined, however, that these actions did qualify as UPAs under the Statute. DoD Directive 7050.06 states that a personnel action is any action taken on a member of the Armed Forces that *affects, or has the potential* (emphasis added) to affect, that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for mental health evaluations under DoD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's grade.

Of the cases the Team reviewed, one contained LOCs that stated, additional action may be taken against the member including separation if the subject behavior continues. MRI did not consider those LOCs as UPAs and did not address those LOCs in the case analysis. Similarly, in another case, a forced transfer was not considered a UPA and was not addressed in the case analysis.

Based on the plain language of the DoD Directive 7050.06, letters of counseling, reprimand and instruction are personnel actions that have the potential to affect the member's current position or career. Despite being locally held, letters of counseling, reprimand, or instruction could be used in a later action, as discussed above, and have the potential to affect the service member's current position or career. Moreover, it is also clear that a transfer is considered a personnel action. Therefore MRI should have considered the LOCs and transfer as a UPA and investigated them. For this reason, the Team disagreed with MRI's decision that reprisal was not substantiated. The Team disagreed with MRI's decision in eight cases in the Full Investigation stage; for two of the 18 cases, the Team disagreed because actions taken by the RMO were not considered UPAs.

Conclusion

Of the 169 military whistleblower reprisal complaints provided to the Team, 13 were not reviewed due reasons articulated in each of the previous sections. Of the 156 reviewed by the Team the Team agreed with 82 of the decisions reached by MRI, and disagreed with 74. This does not mean that the Team thought that 74 cases would have been substantiated had they gone to full investigation. To the contrary, the Team believes that many of the cases would not have been sustained; however, The Team could not affirm the decision because the information in the files did not support it or necessary investigative steps were not completed.

In addition to the actual investigative process, another concern is related to case tracking. For example 11 of the 169 cases appeared to be open when they were coded as closed. Additionally, several of the cases in which the Team agreed with MRI's decision were instances where the complainant had withdrawn their allegation. The Team's concern is the withdrawal may be directly related to the length of time it took to address their complaint. In a few cases the allegation was substantiated, but the RMOs had already left the service. The Team thinks the misidentified cases and the length of time taken to complete investigations may be indicative of a larger issue dealing with tracking and management of complaints.

The Team believes that if the report recommendations are implemented, cases could be concluded with minimal additional work, and the ultimate decision would be more supportable. Moreover, the Team believes the implementation of the report recommendations would improve the overall process and better serve DoD.

Recommendations

1. Establish written procedures for handling and investigating reprisal complaints and update IGDG 7050.6 and DoD Directive 7050.06 accordingly. Develop definitions for key terms (e.g. sufficient evidence) to ensure consistency and objectivity in processing cases.
2. Complaints that involve locally held letters of reprimand, counseling, or instruction should not be summarily dismissed. Instead, the complaint and the letters of reprimand, counseling, or instruction should be reviewed to determine whether it affects, or has the potential to affect the Service member's current position or career.
3. Require that the RMO(s) be interviewed prior to making a determination as to whether there is sufficient evidence to warrant a full investigation or whether reprisal occurred by a preponderance of the evidence.
4. Conduct an internal audit of case tracking/file system(s) for MRI complaints to ensure complaints are processed in a timely manner and accurately tracked and managed.
5. Require that MRI files concerning military reprisal complaints investigated by the Directorate for ISO contain the entire file developed by ISO, including transcripts of all interviews.

6. Implement procedures to comply with statutory and regulatory notification requirements when exceeding the 180 day limit. During the review, the Team noticed many cases that exceeded the allowable time limit, but saw no indication that the member or the Deputy Under Secretary of Defense for Program Integration, Office of the Under Secretary of Defense for Personnel and Readiness, were notified as required.